

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
JOE SHOCKLEY AND THE	)	DOCKET NO. 81-82
VERMONT STATE COLLEGES	)	
FACULTY FEDERATION, AFT	)	
LOCAL 3180, AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On December 15, 1981, the Vermont State Colleges Faculty Federation, AFT Local 3180, AFL-CIO ("Federation"), filed a petition with the Vermont Labor Relations Board on behalf of Joe Shockley ("Grievant"), a faculty member at Lyndon State College. The petition alleged various violations of the collective bargaining agreement (Joint Exhibit 1) between the Federation and the Vermont State Colleges ("Colleges") in the nonrenewal of Grievant.

Specifically, the Federation alleged the following:

1. Grievant was a third-year faculty member and his notice of non-reappointment was not accompanied by a written statement of reasons in violation of Article XXXIV.
2. The reasons ultimately provided by the College, failure to demonstrate "substantially above average teaching effectiveness", was "not supported by the evidence and amounts to an unreasonable restriction on Grievant's teaching methods", in violation of Grievant's academic freedom.
3. Grievant's file contained a recommendation by Academic Dean James Graby which was "untrue and inaccurate". The recommendation was not removed from the file after its inaccuracies were identified in violation of Article XXXIX(1).

4. Dean Graby's evaluation was not entered into the file "within 30 days of receipt", in violation of Article XXXIX (5).

A hearing was conducted on February 18, 1982, before the full Board at the Board hearing room in Montpelier. Stephen Butterfield, Grievance Chairperson of the Federation, represented the Federation. The Colleges were represented by Attorney Nicholas DiGiovanni.

At the hearing, the Federation sought to amend its petition to further allege the College's actions in not reappointing Grievant amounted to a "discriminatory application of a rule or a regulation" (Article XIV A), as Grievant was discriminated against on the basis of age, sex and handicap. The Colleges objected to the amendment. The Board admitted evidence relating to discrimination on a tentative basis subject to a final ruling upon the submission of briefs.

Briefs were filed by the Colleges and Federation on March 11 and 12, 1982, respectively.

#### FINDINGS OF FACT

1. Grievant began teaching at Lyndon State College as an Assistant Professor in the Department of Recreation and Leisure Studies in September of 1978. On February 28, 1979, he received notice from President Janet Murphy that he would be reappointed for a second year (Grievant's Exhibit #2).

2. During his second year, 1979-80, Grievant was reviewed for a third year reappointment. On December 7, 1979, Dean Ronald Addison recommended Grievant be reappointed, but noted several areas of concern for future reappointment. He stated:

Student comments on instruction should show a better understanding of his goals for a course. A frequent comment is that the course did not provide sufficient challenge. I suggest Dr. Shockley consider these comments to see if methods, content or student perception need to be changed.

3. The same day, President Murphy reappointed Dr. Shockley for a third year, observing, however, that "areas of concern for future reappointments listed in the Dean's recommendation are among my concerns for future positive personnel actions." (Grievant's Exhibit 7).

4. Shortly after being reappointed, Grievant discussed the Dean's concerns with him and took steps to improve his teaching. Grievant developed an evaluation form to see if students were meeting the goals of the course, and gave pre-course and post-course tests to students to see if they actually learned course goals and retained course content. Test results indicated students showed some improvement in test scores after taking the course (Grievant's Exhibit 28).

5. Grievant suffered a heart attack in Spring 1980.

6. On August 25, 1980, Dean Addison, subsequent to observing one of Grievant's classes, recommended Grievant be reappointed for a fourth year, the 1981-82 academic year. However, Dean Addison again noted:

I have discussed the high percentage of low student ratings of instruction that he has received. I am convinced he is taking steps to correct this problem.

I base my recommendation for reappointment upon his proven ability at another institution, his terminal degree, his potential to the department, and his willingness to work to improve his instruction as perceived by the students.

(Grievant's Exhibit 9)

7. A few days later, President Murphy reappointed Dr. Shockley, again noting the same concerns Dean Addison expressed about his teaching (Grievant Exhibit 10).

8. James Graby replaced Addison as Academic Dean in 1980-81. Dean Graby reviewed Grievant for reappointment to a fifth year in Spring, 1981.

9. Throughout his employment at Lyndon, Grievant received letters and recommendations from peers commending his work and supporting his reappointment. Grievant was commended for his contributions to the Department of Recreation and Leisure Studies by Andrew Haaland, his Department Chairperson (Grievant's Exhibit 1, 5), and Cathy DeLeo, his co-chairperson and colleague (Grievant's Exhibits 4, 11). The Faculty Appointment, Promotion, and Tenure Committee noted the "adequacy" of Grievant's teaching in December, 1979 (Grievant's Exhibit 6), and in recommending him for reappointment to a fifth year in May, 1981, stated: "His student evaluations have improved considerably, attesting to Dr. Shockley's continued growth and development in the classroom." (Grievant's Exhibit 14). These materials were in Grievant's personnel file when Dean Graby reviewed him for reappointment.

10. Also in Grievant's file at the time was a summary of his scholarly and professional growth (Grievant's Exhibit 27). This summary indicated, among other things, Grievant had published four articles in national journals (the latest being December, 1978).

11. Grievant was reviewed for reappointment for a fifth year in accordance with the Colleges' August 8, 1980, Administrative Policy and Criteria for Appointment, Promotion, and Tenure (Joint Exhibit 2). The criteria provide that to warrant reappointment, faculty "should be substantially above average in teaching effectiveness".

12. On May 7, 1981, Dean Graby wrote his evaluation and recommendation on Grievant (Grievant's Exhibit 13). In the category of teaching effectiveness, Graby evaluated Grievant as "average" in teaching performance and recommended he not be reappointed. Graby noted student evaluations of Grievant's teaching effectiveness indicated several areas in which he was effective, including preparation and knowledge of the subject matter. However, Graby stated:

Students in his upper level courses...make comments which betray their lack of motivation or at least their lack of effort relative to his courses. The range of comments is fairly broad, but many of the students speak of becoming bogged-down in tedious details or suggest rather bluntly that Dr. Shockley is boring. This pattern of comments in lower level and upper level courses suggests to me that the organization of the courses or the curriculum or both may need re-examination.

13. Also on May 7, 1981, Dean Graby wrote his evaluation and recommendation on two other members of Grievant's department, Catherine DeLeo and John DeLeo. Graby evaluated both DeLeo's as average instructors, but recommended they be reappointed. In the case of Catherine DeLeo, Graby recommended she be warned her chances of further reappointment or tenure were doubtful unless her teaching effectiveness significantly improved (Grievant's Exhibits 25, 26).

14. In his evaluation of Catherine DeLeo, the Dean stated some students in their evaluation of DeLeo's teaching effectiveness described her as "very unprepared" and "a very high number of students would describe her as generally unenthusiastic". A review of students' evaluations by a fellow faculty member, Brian Kelly, indicated three of 47 evaluations contained negative comments on DeLeo's enthusiasm, and two had negative comments about her preparation.

15. Graby's evaluations of Grievant and the DeLeo's are dated May 7, 1981, but were not entered into their personnel files until June 26, 1981. The College started its summer recess sometime in May.

16. In a memorandum of May 7, 1981, addressed to the entire Department of Recreation and Leisure Studies, Dean Graby stated that in reviewing the evaluations students did of the Department faculty, he concluded students did not understand or accept the need for classroom study and the faculty had not been able to communicate to students the difference between recreation as an activity and recreation as an academic discipline and career.

17. Grievant is 49 years old; the DeLeo's are in their 30's.

18. President Murphy conducted her own review of Grievant. On July 17, 1981, the President informed Grievant he would not be reappointed for the 1982-83 academic year. She gave no reasons for the decision (Grievant's Exhibit 15).

19. Grievant was not provided with reasons for the non-reappointment until after he grieved his non-reappointment. Perry Viles, in the Step I answer to the grievance, dated September 16, 1981, told Grievant President Murphy did not reappoint him because he was not able to demonstrate substantially above-average teaching effectiveness (Grievant's Exhibit 19, Pg. 3).

20. In conducting a review of a faculty member, President Murphy generally gives the greatest weight to the Dean's recommendation and the student evaluations.

21. President Murphy reviewed 17 faculty members during the summer of 1981. Her reviews were independent of the Dean and, while she was influenced by his recommendation, conducted her own analysis because she

believed she knew the faculty better than Dean Graby due to her longer tenure at Lyndon. In 16 of the 17 cases, she concurred with the Dean's ultimate recommendation.

22. President Murphy concurred with Dean Graby's recommendation that the DeLeo's should be reappointed, but disagreed their teaching effectiveness was average. She rated them substantially above average.

23. The student evaluation form in use at Lyndon does not allow the evaluator to check off appropriate boxes to rate the instructor (i.e. Below Average, Average, Above Average), but instead provides only for written answers to a series of questions.

24. Grievant did two analyses of student evaluations of his performance. Grievant's first analysis was done on August 14, 1981. Grievant reviewed 329 upper course level student evaluations, and found 134 (or 40 percent) "above average, very good or excellent, while only 83 mentioned comments that can be construed as being below average and/or tedious, and/or boring". These conclusions were contained in the Step I grievance filed in this matter (Grievant's Exhibit 16). At the hearing, Grievant introduced a different analysis in which he found 83 percent of 365 evaluations positive or excellent, and 17 percent negative. Grievant found the evaluations to show a consistent improvement over six semesters. He determined that in Fall, 1978, Grievant's first semester, 62 percent of his students gave him overall positive ratings and 38 percent were negative; by Spring, 1980, this proportion changed to 92 percent positive and 7 percent negative; by Spring, 1981, it improved further to 95 percent and 5 percent respectively (Grievant's Exhibits 23, 24).

25. The Board has conducted an independent review of Grievant's student evaluations, and finds that among the 365 evaluations students did of Grievant, 44 evaluations referred to Grievant's teaching or the course content as tedious or boring.

26. The Board finds 24 of 50 (or 48 percent of) student evaluations of Grievant for Fall, 1978, contained negative comments about his teaching effectiveness. For Spring, 1980, 9 of 62 (or 15 percent) contained negative comments. 7 of 44 evaluations (or 16 percent) for Fall, 1980, contained negative comments, and for Spring, 1981, 8 of 55 (or 15 percent) contain negative comments about Grievant's teaching effectiveness.

27. Even if we accept Grievant's self-assessment of student evaluations as accurate, there is no evidence from which we can conclude whether the percentage of positive and negative ratings places Grievant above or below other faculty members.

28. President Murphy evaluated Grievant's teaching effectiveness as below average. In making this determination, she reviewed Grievant's student evaluations and the entire contents of his personnel file.

29. President Murphy spent one and one-half hours reviewing student evaluations on Grievant for his three years of employment.

30. In their review of Grievant's student evaluations, neither Dean Graby nor President Murphy added or tallied the numerical frequency of any type of student comment to arrive at their ratings. In conducting reviews, if President Murphy sees a large number of comments that are similar, she will note the frequency of the comments.

31. The student evaluation form provides space for two signatures from the student filling it out: a mandatory signature, which is



clipped off and kept in a separate file, and an optional signature, which remains on the form. To be valid for use in making personnel decisions, every form must have a mandatory signature. Seven forms without mandatory signatures were included in the evaluations reviewed by the Dean and President.

32. President Murphy's testimony on her review of Grievant's student evaluations was contradictory. She first testified that she read only forms with optional signatures, that if there was no signature in the optional signature space, she passed right by them. This statement meant she would have ignored a substantial number of valid forms. Under cross examination, she changed her testimony. She stated she assumed all the evaluations in the file she reviewed had been validated by the Academic Dean's Office, and she read all evaluations in the file.

33. In reference to the number of students who found Grievant's classes tedious and boring, President Murphy stated any teacher who cannot make his own subject matter interesting, especially when teaching a subject that is his students' major, has real problems.

34. President Murphy believes there is no definition of "average" which can serve as a guideline by which teaching effectiveness can be measured. An evaluator would have to read several personnel files to get a feel for what is excellent, average, or poor teaching. If one or two student evaluation forms out of 20 per semester gave a teacher an average rating, she would consider that teacher average.

35. President Murphy found Grievant's student evaluations for his third year to show a slight improvement over the first two years.

36. In both the Step I and Step II grievances filed in this matter, Grievant claimed one member of his department with an identical teaching record (whom he did not identify) was given a warning to get student evaluations up or face non-reappointment later, while he was terminated. Grievant charged reappointing that person discriminated against him because he was not given the chance to improve, and the discrimination was unlawful because it was based on age, sex, or handicap (Grievant's Exhibits 16, 22). The Department member referred to by Grievant was Catherine DeLeo, a presumably healthy female, then in her 30's, while he was a 49-year old man with a heart condition.

37. The petition filed with the Board did not allege discriminatory application of a rule or regulation or discrimination because of age, sex, or handicap.

38. Grievant was responsible for teaching courses in the Fall and Spring semesters. He had no responsibilities at the College during the summer.

#### MAJORITY OPINION

#### PROCEDURAL ISSUES

##### Federation's Motion for Leave to Reopen

Subsequent to the hearing, the Federation moved the Board to reopen the hearings. The Federation alleged statements made by Lyndon Dean Ray Dethy at meetings held February 23 and March 9, 1982, that Grievant's position would not be filled if he did not return in the Fall due to financial reasons, indicate the real reason for the non-renewal of Grievant was financial in nature and not motivated by the criterion of teaching effectiveness.

We deny Grievant's motion to reopen the hearing because it is untimely raised. The grievance procedure negotiated by the parties, Article XIV of the Agreement, provides the nature of the grievance and the provisions of the Agreement alleged to have been violated shall be stated at the first step. Article XIV C(1). The Agreement further provides the failure of the grievant to comply with the time limitations of the grievance steps shall preclude any subsequent filing of the grievance. Article XIV F. The Federation raised no allegations at the first step of the grievance procedure, or any subsequent step for that matter, that Grievant's nonreappointment was really a layoff. Failure of Grievant to raise the issue earlier precludes him from raising it now. Grievance of Bryan O'Neill, 3 VLRB 100, at 103 (1980). In any event, we are not convinced financial assessments made by Dean Dethy in February and March, 1982, indicate the rationale of a decision made eight to nine months earlier, particularly since the Dean was not at the College when the non-reappointment decision was made.

Federation's Motion to Amend Petition to Allege Discrimination Based on Sex, Age or Handicap

The Federation seeks to amend its petition to allege Grievant was discriminated against based on sex, age, or handicap. In both the Step I and Step II grievances filed, Grievant claimed one member of the Department was given a warning to get student evaluations up or face nonreappointment later, while he was terminated. Grievant charged reappointing that person discriminated against him because he was not given the chance to improve, and the discrimination was unlawful because it was based on age, sex or handicap. However, in the petition filed with the Board, Grievant did not allege he was discriminated against on

the basis of age, sex, or handicap, and did not reference the Anti-Discriminations provision of the Agreement.

Section 233 of the Board's Rules of Practice provides the notice of grievance filed with the Board shall contain a concise statement of the nature of the grievance and specific references to the pertinent sections of the collective bargaining agreement. The petition did not comply with these requirements in relation to a discrimination claim. The Colleges, thus, were not on timely notice discrimination was an issue. Failing agreement by the Colleges to allow the Federation to amend the petition, we consider the issue untimely raised.

In any event, the mere fact Grievant is a 49-year old male with a heart condition, and Catherine DeLeo, the faculty member referred to by Grievant in his discrimination claim, is a presumably-healthy female in her thirties, does not establish discrimination. Grievant presented no evidence indicating discrimination based on age, sex, or handicap, was a motivating factor in the President's decision. The Colleges, as will be discussed later, had valid non-discriminatory reasons to not reappoint Grievant.

Failure of Colleges to Give Grievant Timely Notice of Reasons for Reappointment

The Federation contends the College failed to give Grievant timely notice of the reasons for the nonreappointment decision. Article XXXIV of the Agreement, Appointment, Reappointment and Review, provides:

Reappointment is presumed unless there is written notification of nonreappointment no later than (a) March 1 of the first year of service, (b) December 15 of the second year of service, (c) September 1 of all succeeding years... In all cases of nonreappointment, written notice of reasons shall be given after the third full year of service.

Grievant was notified of non-reappointment to a fifth year July 17, 1981, six weeks prior to the contractual deadline. However, the notice was not accompanied by reasons. Grievant was not provided with reasons until September 16, 1981, in the Step I answer to the grievance at hand. The College argues reasons did not have to be given to Grievant because his "third full year of service" did not end until September 1, 1981. The Federation argues Grievant's "third full year" ended at the end of the academic year in May, 1981.

We have looked to other provisions of the Agreement to determine the meaning of "full year of service". Article XXXVII, Salaries, provides:

- 1) Faculty shall be paid on a twelve-month basis. Payment shall be by bi-weekly paychecks, with the faculty member having the option of lump sum payment at the end of the academic year for the remainder of the twelve-month period.
- 2) Faculty (excluding librarians) shall be paid for service rendered during the academic year...

Article XVI, Layoff, bases layoffs on "number of semesters of full-time teaching service".

These provisions make it evident an academic year is a full year of service. Faculty are hired to serve during the September-May academic year. They are reimbursed for service rendered during the academic year, and have no responsibilities at the College during the summer. Seniority, for layoff purposes, is not measured by the calendar year but semesters of service. We, thus, conclude, Grievant's third "full year of service" ended with Commencement in May, and was entitled to be provided with reasons when he was notified of non-reappointment in July.

However, the failure of the College to provide Grievant with reasons resulted in no demonstrated harm to him. Grievant sought redress from the College's failure through the grievance procedure and was provided with reasons September 16, 1981, in the College's Step I answer. Grievant presented no evidence to show he was harmed by the two-month delay in obtaining reasons for the non-renewal. A reading of the Step I grievance filed by Grievant August 14, 1981, indicates he was aware his teaching effectiveness was a major factor in the decision not to reappoint by that date. In the grievance, Grievant gives the conclusion of an evaluation he did of his student evaluations to demonstrate his teaching was at least above average. Since he was prepared to defend his teaching at this point, the fact he was not officially notified his teaching effectiveness was the reason he was not rehired until a month later seems relatively harmless.

We note, unlike Vermont State Colleges Faculty Federation and Michael Peck, 4 VLRB 334 (1981), it is not evident the College was disregarding negotiated provisions by not providing Grievant with reasons July 17. It is apparent they had a serious contention whether reasons had to be given. Accordingly, this is not an instance where we believe it appropriate to enforce provisions of a collective bargaining agreement by awarding monetary damages.

Untimely Entering of Dean's Evaluation in Personnel File

The Federation contends Dean Graby's evaluation was not entered into Grievant's personnel file "within 30 days of receipt", in violation of Article XXXIV (5). Article XXXIX (5) provides:

Except as specified elsewhere in the Agreement, all material will be placed in the personnel file within 30 days of receipt by the College, excluding the summer and winter recesses as established in accordance with Article XLIII (emphasis added).

Graby's evaluation of Grievant was dated May 7, 1981, but was not entered in Grievant's personnel file until June 26, 1981. No violation of Article XXXIX (5) occurred here. Summer recess started sometime in May, less than 30 days after Graby's report was completed, and the 30-day clock stopped running during Summer recess.

Clearly, Grievant was not harmed by the delay in placing the evaluation in the file. Article XXXIX (1) gives the faculty member the right to respond to any document in his personnel file. The Dean's recommendation was placed in Grievant's file on June 26, 21 days before the President made her non-reappointment decision. Twenty-one days was sufficient time for Grievant to rebut the Dean's evaluation prior to the President's decision if he so desired.

#### MERITS

The first contention by the Federation is Dean Graby's assessment of Grievant's teaching amounts to a violation of his academic freedom. Article VII of the Agreement, Academic Freedom, states:

...academic freedom shall encompass the unconditional freedom of discussion of any material relevant to any course which a faculty member has been assigned to teach and, to this end, there shall be no unreasonable restrictions upon instructional methods.

In his evaluation of Grievant, Dean Graby comments:

...many of the students speak of becoming bogged-down in tedious details or suggest rather bluntly that Dr. Shockley is boring. This pattern of comments...suggests to me that the organization of the courses or the curriculum or both may need re-examination.

As the findings indicate, 44 of 365 student evaluations of Grievant referred to his teaching or course content as tedious or boring. By noting this and offering suggestions for improvement, we fail to see how Dean Graby was violating Grievant's academic freedom. The Dean was not restricting Grievant's teaching methods, but simply expressing a criticism, reflecting the views of 12 percent of students that the methods used by Grievant failed to motivate them or bored them. This is a fair evaluation of the results obtained by using a teaching method, and is not a restriction on those methods.

The second issue on the merits is whether Dean Graby's recommendation of Grievant was "untrue and inaccurate" in violation of Article XXXIX(1) which states:

The faculty member shall have the right to grieve the insertion in his personnel file of any administrative report which he or she alleges to be untrue or inaccurate.

Here, the Federation presented no evidence to demonstrate Dean Graby's recommendation met the requisite "untrue" or "inaccurate" test. The Federation may disagree with Dean Graby's judgment that Grievant was average in teaching effectiveness, but Graby's assessment did not contain unfounded allegations, nor was it plainly contrary to fact, or based on incorrect information. Grievance of Stewart McHenry, 4 VLRB 236 (1981). c.f. Grievance of Diane Fairchild, 4 VLRB 164, at 175-76 (1981). Grievance of Jan Lewandoski, 4 VLRB 347, at 358-59 (1981).

The next issue before us is to determine the scope of our review of non-reappointment decisions made by presidents after a faculty member has completed his/her third year of service; this being our first such case.



Article XXXIV of the Agreement provides that in all cases of nonreappointment, written notice of reasons shall be given after the third full year of service. However, nowhere in the Agreement is the scope of the Board's review stated.

The Colleges argue the decision by the President in such cases cannot be litigated, except in cases alleging discrimination based on age, race, sex, union activity, etc., pursuant to Article VIII of the Agreement. Otherwise, the Colleges contend the determination of who is an effective teacher is a matter of academic judgment entirely within the prerogative and expertise of the President and is unreviewable by the Board. The requirement for a statement of reasons under this view is entirely procedural, and implies no substantive criteria.

The Federation maintains the existence of the contractual language providing for written notice of reasons for the nonreappointment decision means the factual basis for the reasons, and their validity, are subject to re-examination by us. The Federation characterizes the Colleges' position that we cannot review the basis for the decision because it is an "academic judgment" as jargon.

We reject the position of both parties. The Federation argument would extend the Board's scope of review beyond that applicable to tenure cases. There we have no right to make "academic judgments" but may remand cases to an ad-hoc committee if we determine the reasons given were erroneous or the decision constituted an arbitrary or discriminatory application of the tenure criteria. Article XXXVI of the Agreement. If the parties intended our review in nonreappointment decisions to be broader, and in effect permit us to make academic judgments

which substitute our views for those of the President, they did not do so in this contract.

However, we cannot entirely accept the Colleges' rationale that we must quit the field altogether. Effective teaching is a question of fact as well as academic judgment. It is not easy to measure. Since the days of Socrates the issue has defied constraint. Nothing could be more obvious than the fact that subjective judgment enters into any determination on teaching effectiveness. However, "effectiveness" is also a factual matter. The "academic freedom" article of the contract forbids judgments based on content, so the criteria to be applied necessarily relate to the ability of a teacher to engage students' interest and intellect, and presumably draw other students to the college. If a faculty member received uniformly laudatory comments from peers and students to the effect he was an inspired pedagogue, and the President rated the faculty member average or below average in teaching effectiveness, a question of fact may very well be raised. We believe our function, then, is to carefully scrutinize the facts, to determine whether there is a rational basis for the President's decision. If we find such a basis, the President's decision should be upheld. Hackel et al. v. Vermont State Colleges, \_\_\_ Vt. \_\_\_ (1981).

The Federation challenges the rationality of the President's judgment by a statistical analysis of Grievant's student evaluations. It claims to demonstrate Grievant was in fact a substantially above-average teacher. The Federation asks the Board to reverse the President because 83 percent of student evaluations rate Grievant "positive or excellent". We cannot accept the seeming alluring comfort and security of the Federation's mechanistic methodology for four reasons:

1. There is no evidence to show on a faculty-wide basis what the standard is for teaching excellence. A review of student evaluations may indicate students rate a teacher above average, but the President may consider such a rating as the norm, and teachers would have to do significantly better to meet the criteria. "Above average" must be in relation to something, and we think the President's role requires a mind which assesses performance within the academic community. Moreover, we cannot tell on this record whether 17 percent negative comments are below average or above.

2. Here, some student evaluations characterized Grievant as "boring". Such a comment, where Grievant is teaching in his students' major subject field, may indicate a serious deficiency. We cannot determine by a statistical analysis whether such comments should be given greater weight than those, for instance, describing a teacher as unprepared or not respecting student opinion. c.f. Grievance of William Sypher, 5 VLRB 106 (1982).

3. The measurement device itself used in this analysis - student evaluation forms - do not, at least in this case, allow for evaluators to check the appropriate category to rate the instructor (i.e. Below Average, Average, Above Average), but instead provides only for written answers to a series of questions. As a consequence, an analysis of such evaluations is necessarily subjective.

4. If effective teaching is measured solely by student evaluations, this excludes the expertise in such matters of a faculty member's peers and the College Administration, including the President and Dean.

In the case before us, the College has demonstrated a significant number of students found Grievant's teaching, or the course content, to

be tedious or boring. This constitutes a substantial factual basis for the judgment of President Murphy that Grievant was not substantially above-average in teaching effectiveness. It was not unreasonable for the President to conclude Grievant lacked effectiveness as a teacher because he could not make his subject matter interesting to a significant number of students, especially when teaching a subject that was his students' major. That is a judgment we must assume President Murphy has special expertise to make, and we are not prepared to say the arithmetic computation analysis of Grievant's student evaluations introduced by the Federation is a valid tool to demonstrate the judgment of the President is wrong in fact.

While Mr. Kemsley's dissent presents cogent reasons for a different result, we believe the logic of that approach would lead to a mechanical evaluation of the faculty based solely on student opinion. Any principle leading to a mere statistical computation of excellence of teaching in a college we think would ultimately deprive the colleges of initiative and imagination both in faculty and administration; and we are skeptical of any system which would ultimately leave decisions regarding retention of faculty to student opinion rather than the considered judgment of the President based on demonstrable facts.

ORDER

Now, therefore, based on the foregoing findings of fact and for all the foregoing reasons, it is hereby ORDERED:

The Grievance of Joe Shockley and the Vermont State Colleges Faculty Federation is ALLOWED to the extent that the Vermont State Colleges violated Article XXXIV of the collective bargaining agreement in failing to give Dr. Shockley timely notice of the reasons for the nonreappointment decision; and DENIED in all other respects.

Dated this 27<sup>th</sup> day of May, 1982, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Kimberly B. Cheney  
Kimberly B. Cheney, Chairman

James S. Gilson  
James S. Gilson

*Appeal to Sup. Ct.*  
*Appeal dismissed pursuant*  
*to slip filed 3/31/83*

#### DISSENTING OPINION

I concur with the majority opinion in all respects except for their handling of the scope of Board review of nonreappointment decisions made by a President after a faculty member has completed his/her third year of service. The majority errs in effectively precluding consideration of analyses of student evaluations.

The reappointment criteria provide that faculty members substantially above-average in teaching will be retained. If we are going to disregard statistical or other analyses of student evaluations, we essentially make the President's decision unreviewable. This will subject faculty members to arbitrary decisions from the President and make the reappointment criteria merely a facade.

The contract provides that student evaluations shall be considered by the President in reappointment decisions. Article XXXIII(4). Even if we grant some credence to the majority's analysis of the imponderables that go into these decisions, the majority remakes the contract by not placing substantial weight on the student evaluations in determining whether the President's decision had substantial basis in fact.

Even granted the weakness of the measuring tool we have, the student evaluations, they are what the parties have bargained for. Further, we are directed to look at only the personnel file of the grievant and not other faculty members. cf. Grievance of Diane Fairchild, Concurring Opinion, 4 VLRB 164, at 183-87 (1981). I conclude we must decide whether the President's decision can be supported by determining what percentage of student evaluations are above average. Here, the substantial majority of student evaluations rated Grievant above average in teaching effectiveness.

Thus, it must be concluded he is, in fact, substantially above average in teaching effectiveness. Any judgment to the contrary is simply erroneous. President Murphy's testimony in this case was sufficiently contradictory to cast doubt on the thoroughness of her review of Grievant. Accordingly, I conclude the judgment was arbitrary and must be reversed.

All labor contracts are efforts to limit the arbitrary exercise of management's power over employees. The process of collective bargaining results in job security for competent individuals. Grievant was at least a competent teacher. The majority, by supporting the President's erroneous decision to not reappoint Grievant, subverts the contract and the entire purpose of collective bargaining.

  
William G. Kemsley, Sr.